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The Next Iteration of Progressive Corporate Law

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Table of Contents

I. Introduction

Corporate law—in theory, in statute, and in practice—is oriented around the idea of shareholder primacy.[1] A sizeable and prestigious swath of the corporate law academy has adopted shareholder wealth maximization as the field's normative touchstone,[2] uses finance-based law and economics as the field's

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1. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 280 (1998) ("The shareholder primacy norm is considered fundamental to corporate law.").

2. *See* David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1014 (2013) (noting that "proponents of radical shareholder primacy . . . include most of the biggest names in the corporate law academy").

primary methodology,[3] and employs share-price-oriented event studies to assess the success and failure of various corporate law doctrines empirically.[4] In contrast, progressive corporate law has provided resistance to the law and economics movement, has drawn upon alternative disciplines for its research and analysis, and seeks to move beyond shareholder primacy to a communitarian vision of the corporation.[5] In so doing, progressive corporate law has provided an important intellectual counterweight to the predominant paradigm.

Ultimately, however, progressive corporate law must change if it is to continue to provide shareholder primacy with a robust academic alternative. In many ways, progressive theory remains trapped in the dialectic with corporate law and economics that began in the 1980s.[6] Thus far, it has not won the argument.[7] My recommendations are for significant changes in the literature upon which progressive corporate law draws; changes in the conception

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3. *See* Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 345–46 (2005) [hereinafter Romano, *After the Revolution*] (describing the "revolution" of modern finance becoming a cornerstone methodology in the study of corporate law).

4. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 639 (2006) ("An increasing number of scholars in law, economics, finance, and related fields are using event studies, regression analysis, and other statistical tools to evaluate the effect of corporate law on firm value.").

5. *See* David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 1, 3 (Lawrence E. Mitchell ed., 1995) [hereinafter Millon, *Foundations*] (describing "the central communitarian tenet" as "the willingness to talk about obligations existing independently of consent and a consequent unwillingness to allow bargaining power disparities to prevent substantively just outcomes").

6. *See* David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1389 (1993) [hereinafter Millon, *Communitarians*] ("[G]iven the depth of disagreement [between shareholder primacy advocates and communitarians], it should come as no surprise that no realistic possibility of compromise has yet emerged . . . . The crisis is here, and we should expect it to continue.").

7. For arguments against progressive corporate law from a mainstream corporate law perspective, see Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 903 (1997) (criticizing the progressive agenda as "unlikely to make much headway . . . [because] it fails to offer . . . a model for predicting human behavior that seems capable of displacing those successfully employed by mainstream law and economics scholars . . . [and] its communitarian elements . . . run counter to the spirit of a democratic capitalist society").

of the corporation upon which it builds; and changes in the types of reforms for which it advocates. In brief, I argue that progressive corporate law should draw upon economic literature concerning the theory of the firm; should focus on employees and shareholders as the true participants in the firm; and should advocate for structural changes in corporate governance. These changes will likely not be amenable to those who remain comfortable with the communitarian, CSR-oriented approach that has characterized progressive corporate law. But we are stuck in a rut. Below I discuss why progressive corporate law needs to head in new directions and how it can do so.

II. Moving to the Theory of the Firm

When law and economics burst onto the corporate law scene in the 1980s, it had a significant advantage over its doctrinal rivals: namely, a rigorous interdisciplinary methodology that could be applied to arrive at doctrinal answers.[8] In some ways, the corporate law and economics revolution was a part of the broader law and economics movement that began sweeping the academy in the 1970s.[9] That revolution—based largely on using the tools of microeconomic analysis to resolve legal questions—endeavored to reexamine and retheorize all areas of law, from torts and contracts to family law and constitutional theory.[10] However, corporate law had its own tradition of using economics. In 1965, Henry Manne's

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8. *See* Romano, *After the Revolution*, *supra* note 3, at 342 ("Corporate law is a field that underwent as thorough a revolution in the 1980s as can be imagined, in scholarship and in practice, methodology, and organization . . . . This revolution has produced one of the more interdisciplinary fields of law.").

9. *See* Jonathan Klick & Francesco Parisi, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking, in* LAW AND ECONOMICS: PHILOSOPHICAL ISSUES AND FUNDAMENTAL QUESTIONS 104, 105 (Aristides N. Hatzis & Nicholas Mercuro eds., 2015) (describing the increased use of economic analysis to achieve a better understanding of the legal system that existed in the 1970s which "gradually exposed the economic structure of basically every aspect of a legal system, from its origin and evolution, to substantive, procedural, and constitutional rules"). A foundational work in the field is RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

10. *See* Klick & Parisi, *supra* note 9, at 105 ("[T]he incorporations of economics into the study of law was to transform traditional legal methodology irreversibly.").

article on takeovers introduced the notion of economic concepts to challenge existing doctrinal precepts.[11] And in 1972—the same year as Posner's first treatise—Victor Brudney and Marvin Chirelstein published their casebook on corporate finance.[12] Roberta Romano specifically credits their casebook with "introduc[ing] a new methodology, modern finance, into the business law curriculum."[13]

Ever since, mainstream corporate law and economics has had a rigorous set of interdisciplinary research upon which to draw insights about corporate behavior.[14] Using economic modeling, corporate law academics can work through specific scenarios and develop algorithms to resolve questions about likely responses to various inputs within the model.[15] Models can definitively demonstrate that, under certain conditions, one set of actions will provide greater efficiency than others.[16] In conjunction with these models, quantitative analysis of stock prices and other corporate economic data can provide empirical results to illuminate

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11. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); *see* George L. Priest, *Henry Manne and the Market Measure of Intellectual Influence*, 50 CASE W. RES. L. REV. 325, 327 (1999) ("Law and economics is an intellectual movement and the person most centrally responsible for its influence in a market sense is Henry Manne.").

12. VICTOR BRUDNEY AND MARVIN A. CHIRELSTEIN, CASES AND MATERIALS ON CORPORATE FINANCE (1972).

13. *See* Romano, *After the Revolution*, *supra* note 3, at 345 ("It should also be evident that the intellectual roots of modern corporate law scholarship are quite distinct from the standard microeconomic methodology applied in the law and economics literature.").

14. *See* Richard A. Posner, *Norms and Values in the Economic Approach to Law*, *in* LAW AND ECONOMICS: PHILOSOPHICAL ISSUES AND FUNDAMENTAL QUESTIONS, *supra* note 9, at 1, 2 (observing that since the 1970s, "the law and economics movement has become geographically, politically, thematically, and methodologically diverse—as well as much larger, more specialized, more rigorous, more influential, more orthodox").

15. *See* Thomas J. Miceli & Matthew J. Baker, *Introduction* to RESEARCH HANDBOOK ON ECONOMIC MODELS OF LAW 1 (Thomas J. Miceli & Matthew J. Baker eds., 2013) ("The usefulness of [economic] models is that they allow the analyst to focus on answering a specific question with respect to a particular legal rule under scrutiny, and to derive a clear understanding as to what its effects will be . . . .").

16. *See* John E. Noyes, *An Introduction to Law and Economics by A. Mitchell Polinsky*, 59 N.Y.U. L. REV. 410, 414 (1984) ("Economic analysis allows clear and consistent definitions of terms and formulations of concepts. The resulting models appear precise, even elegant. One need apply few tests to determine whether a legal rule is a good one; efficiency is the central criterion.").

underlying debates.[17] This double methodological punch has proven quite powerful in reshaping the corporate law field.[18]

The widespread adoption of financial economics and corresponding empirical analysis does leave open the opportunity for cogent critique. And in fact, progressive corporate law scholars have attacked the premise of corporate law and economics—specifically, shareholder wealth maximization—as well as the focus on financial returns to shares as the normative driver for the scholarship.[19] For the empirical work to match up with the theory, the models must aim for shareholder wealth maximization.[20] These premises have been challenged on two fronts. First, a variety of commentators have challenged the literature on its own terms by arguing that shareholder wealth maximization must be measured in the long term.[21] Event studies often measure

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17. *See* Fred S. McChesney, *Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg*, 89 COLUM. L. REV. 1530, 1538 (1989) ("In corporate law today, relatively simple econometric techniques and the availability of stock-price data have made it possible to test hypotheses about firm governance and performance.").

18. Many corporate law scholars employ both theoretical and empirical tools in conducting their research. *See* Randall S. Thomas, *The Increasing Role of Empirical Research in Corporate Law Scholarship*, 92 GEO. L.J. 981, 982 (2004) (discussing the "explosion in the number of theoretical articles that combine theoretical and empirical elements").

19. *See, e.g.*, Millon, *Communitarians*, *supra* note 6, at 1373–74 ("[T]he orthodox assumption [about corporate law's normative foundations] has been that corporate law's objective is to . . . maximize shareholder wealth . . . . [This vision] disregards claims of various nonshareholder constituencies . . . whose interests may be adversely affected by managerial pursuit of shareholder welfare . . . [which] is corporate law's central problem.").

20. *See* Romano, *After the Revolution*, *supra* note 3, at 356

> [P]olicy disputes are, at least in principle, resolvable empirically when there is consensus on ends, as there is among most U.S. corporate law scholars since the field was transformed with the application of finance and the theory of the firm (a consensus that the objective of public, for-profit corporations is to maximize shareholder wealth).

21. *See* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1284 (2002) [hereinafter Bratton, *Enron*] (stating that shareholder value maximization has resulted in an obsession with "short-term performance numbers"); Vice Chancellor Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1764 (2006) [hereinafter Strine, *Toward a True Corporate Republic*] (discussing the increasing focus on quarter-to-quarter earnings); Lynn A. Stout, *Why Carl Icahn Is Bad for Investors*, WALL STREET J., Aug. 1, 2008, at A11 (stating that "activist" shareholders are

movements within a narrow time horizon.[22] Such specific slices of time help to isolate the studied effects, but they may fail to catch longer-term trends that would undercut the initial findings.[23] Especially since the 2008 financial crisis, both academic research and the popular financial press have called the efficient capital markets hypothesis into question, particularly in the short-term.[24] The focus on finance more generally has been blamed for many of our long-term economic ills, particularly income inequality.[25]

As for the second challenge, many have questioned the focus on share price as the *sine qua non* of empirical testing.[26] Stakeholder theory has long argued that the purpose of the corporation is not to maximize shareholder wealth, but rather to maximize the benefits provided to all those who participate in the life of the business, including employees, creditors, suppliers, consumers, and the community, along with shareholders.[27] Stakeholder theorists have not necessarily agreed on the

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usually short-termers). *But see* George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 100–01 (2010) (arguing that shareholders do not have a problem with short-term focus).

22. *See* Fisch*, supra* note 4, at 642–44 (discussing the focus of event studies of share-price movements).

23. *See id.* at 661 (noting that "absent perfect market efficiency, short-term performance and value indicators, such as profitability and stock price, may not accurately reflect the long-term value of operational decisions").

24. *See* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2421 (2014) ("This view of market efficiency has since lost its luster."); Donald Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 175 (2009) ("Doubts about the strength and pervasiveness of market efficiency are much greater today than they were in the mid–1980s."); Baruch Lev & Meiring de Villiers, *Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis*, 47 STAN. L. REV. 7, 20 (1994) ("Not surprisingly, overwhelming empirical evidence suggests that capital markets are not fundamentally efficient."). *See generally* JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET 28 (2011).

25. For critiques of overreliance on finance within the economy, see RANA FOROOHAR, MAKERS & TAKERS: THE RISE OF FINANCE AND THE FALL OF AMERICAN BUSINESS (2016); LAWRENCE E. MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY (2008).

26. *See* Roberto Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 113 (1987) (stating that "the core goal of corporation law" is "the maximization of equity share prices").

27. *See* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 9–10 (2008) (discussing stakeholder theory).

appropriate methods for calculating the appropriate normative target, if such a target were even ascertainable.[28] But share prices themselves are arguably insufficient to bear the full weight of the enterprise.[29] Even scholars who participate in the ongoing theoretical and empirical literature have expressed concern that corporate law scholarship has become too narrowly focused on event studies that track changes in stock prices.[30] By balancing the entire discipline largely on a specific kind of study, measuring a specific kind of data, the current corporate law literature is ripe for a countermovement designed to present a fuller picture.

The problem, at present, is that the countermovement lacks a normative foundation of its own upon which to build its critique. Progressive corporate law—construed broadly—has drawn upon a variety of sources in its research, such as doctrinal analysis, history, basic law and economics, sociological research, and philosophical precepts. Ultimately, however, there has been no sustained and meaningful exploration of an alternative methodology by a group of scholars working in the area.[31]

I have argued in the past that scholars looking for a response to the dominant law and economics narrative need not forego economics to develop an alternative approach.[32] The literature on the theory of the firm endeavors to answer the same question that lies at the heart of corporate law: why do we have firms in the first

28. *See generally* MITCHELL, *supra* note 25.

29. *See* Fisch, *supra* note 4, at 638 ("[T]he measures of shareholder value typically employed by empirical scholars—particularly short-term stock price—are problematic as indicators of firm value and may reinforce inappropriate managerial decisions.").

30. *See id.* ("[E]mpirical scholars need to offer better and explicit justifications for their reliance on shareholder wealth and, more importantly, for their argument that shareholder wealth effects should dominate regulatory policy."). For an example of Fisch's own empirical scholarship, see Stephen J. Choi et. al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016).

31. *See* Bainbridge, *supra* note 7, at 874 ("Although Progressive Corporate Law's authors are united in their rejection of the contractarian model and of the Economic Man model, they achieve less unity in offering an alternative theory of the firm.").

32. *See* Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1044 (2012) ("The economic literature on the theory of the firm should be attractive to scholars looking to push into new frontiers in corporate law because it has the imprimatur of the current corporate law establishment, and yet is relatively underexplored.").

place?[33] In mainstream corporate law and economics, this is a settled question: the corporation exists to maximize shareholder wealth.[34] But this is a deeply unsettling answer from an economic perspective, as it does not explain why the corporate form needs to exist outside of the market.[35] Along these same lines, mainstream law and economics relies primarily on the "nexus of contract" theory to provide the structural basis for their theories.[36] However, the nexus of contract theory endeavors to understand relationships within existing firms; it is not itself a theory of the firm.[37] As Oliver Hart has argued: "the nexus of contracts approach does less to resolve the questions of what a firm is than to shift the terms of the debate."[38]

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33. *See* Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1757–65 (1989) (discussing various theories of the firm).

34. William Bratton, however, recently arrived at the following alternative description of corporate law purpose:

> We set out to frame an accurate and uncontroversial statement of purpose for corporate law. Here is the result: corporate law should facilitate corporate attempts to maximize productive output (and hence wealth) in a competitive economy, encouraging long-term investment at the lowest cost of capital, subject to exterior regulations that control externalities. Many would expect a tighter focus on maximization, but feasibility constraints preclude it. A more specific shareholder value objective would be both descriptively inaccurate and controversial. Finally, social welfare enhancement, while desirable, lies outside the limited sphere occupied by corporate law.

William W. Bratton, *Framing a Purpose for Corporate Law*, 39 J. CORP. L. 713, 723–24 (2014).

35. *Cf.* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 79–84 (2010) (attributing the corporation's success as an organizational form to its limited liability for shareholders); Hart, *supra* note 33, at 1764 (discussing the weaknesses of corporate theory as a theory of the firm).

36. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 8–12 (1991) (describing nexus of contracts theory as "a shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves").

37. *See* Thomas McInerney, *Implications of High Performance Production and Work Practices for Theory of the Firm and Corporate Governance*, 2004 COLUM. BUS. L. REV. 135, 137–38 (2004) ("Scholars working in this paradigm do not offer theories of the firm so much as theories of who controls the firm."); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1624–25 (2001) ("Jensen and Meckling, despite the title, did not really offer a full-fledged theory of the firm. Rather, they offered a theory of agency costs within firms . . . .").

38. Hart, *supra* note 33, at 1764.

The theory of the firm literature, on the other hand, offers a deep and expanding pool of research upon which to draw in seeking to understand the "why" of firms. Progressive corporate law scholars are not content with the status quo; they seek to upend the settled doctrines of shareholder primacy and nexus of contract theory to provide to a more ecumenical, egalitarian corporate structure.[39] Too often, however, progressive scholars have ceded the realm of economics for less defined, and arguably less rigorous, approaches.[40] The theory of the firm offers a sustained interdisciplinary inquiry into the nature of firms (and their legal instantiations).[41] Of course, much of the current work in other social sciences, such as psychology and sociology, dovetails with economic theory and provides additional insights into the basic economic models.[42] The theory of the firm offers a starting point for

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39. *See* Peter C. Kostant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 674–75 (2002)

> There is no uniformity among progressives but we share a concern that corporate law should treat public corporations as at least quasi-public institutions that must be viewed holistically as more than the sum of their privately ordered constituencies. Progressives are also concerned with the interests of corporate constituencies who cannot adequately protect themselves by contract. Progressive legal scholars tend to consider norms of behavior, especially as they involve fairness and social responsibility, and how such norms interact with legal rules. In doing this, our work increasingly utilizes insights from the behavioral sciences.

40. *See* Bainbridge, *supra* note 7, at 859

> Progressive Corporate Law's contributing authors, if pressed hard enough, would most likely not deny the relevance of economic principles to the study of corporate law. To the contrary, many of them make explicit use of selected economic tools. It is thus not economics per se to which they object, but rather to the specific economic models of firms and human behavior embraced by the law and economics school of corporate law and, sub silentio, to the unwillingness of those in the mainstream of law and economics to acknowledge those writing outside the prevailing paradigm.

41. *See* ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013) (describing the legal theories of firms as foundational to understanding how firms are formed, for what purposes, and how firms function as organizational "persons"); Scott E. Masten, *A Legal Basis for the Firm*, 4 J.L. ECON. & ORG. 181 (1988) (exploring the firm as a distinct legal and organizational form).

42. *See* Bodie, *supra* note 32, at 1057 (noting that "the different social science disciplines—economics, psychology, sociology, anthropology—are increasingly borrowing from one another and bleeding into each other's work"); *see also* THE

these inquiries and a basis upon which to build an alternative academic narrative.

III. Employees, Not Stakeholders

In contrast to shareholder primacy—a term first coined by David Millon and Lyman Johnson—progressive corporate law theorists have generally advocated for a stakeholder model of the corporation.[43] Also called the communitarian or multifiduciary model,[44] stakeholder theory argues that corporate governance should take all stakeholders in the corporate enterprise into account.[45] In a sense, it draws upon the nexus of contract theory in identifying the many participants who have a role in conducting the business of the corporation. However, unlike the law and economics contractarians who limit organizational protections to shareholders, stakeholder advocates argue that all participants deserve consideration.[46] Stakeholder reforms have generally centered around weakening shareholder power within the organizational structure and increasing managerial discretion to take other interests into account.[47]

FIRM AS A COLLABORATIVE COMMUNITY: RECONSTRUCTING TRUST IN THE KNOWLEDGE ECONOMY (Charles Heckscher & Paul S. Adler eds., 2006) (taking an organizational behavior approach to the question of the firm).

43. *See* Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 848 (1989) (discussing a "deliberate rejection of the shareholder primacy norm").

44. *See* Simone M. Sepe, *Directors' Duty to Creditors and the Debt Contract*, 1 J. BUS. & TECH. L. 553, 561 (2007) (noting that "communitarians . . . advocate a multifiduciary model where all corporate stakeholders benefit from the attribution of directors' fiduciary duties"); *see also* Millon, *Foundations*, *supra* note 5, at 11–12 (discussing the use of the multifiduciary model by communitarian corporate law scholars).

45. *See* Millon, *Foundations*, *supra* note 5, at 11–12 (discussing efforts to provide protections to nonshareholder constituencies); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 293–94 (1999) (arguing that directors owe a duty to the corporation and that the corporation consists of all of the stakeholders who are responsible for the business of the enterprise).

46. *See* Millon, *Foundations*, *supra* note 5, at 11 (noting especially those whose interests may be negatively affected by the pursuit of shareholder interests and welfare).

47. *See id.* (rejecting the principles underlying shareholder primacy); Blair & Stout, *supra* note 45, at 280–81 (describing directors as "trustees for the

Progressive corporate law needs to move away from stakeholder theory. First, the antagonism towards shareholders has blinded stakeholder theorists to the need to reinforce shareholder power against managerial corruption.[48] The story of the shareholder rights movement, going back to Berle and Means, is one that should resonate with progressives: it is the story of an undifferentiated mass of powerless shareholders separated from meaningful control, and the managers that then take advantage of this vacuum.[49] As one example, progressives might very well applaud efforts by the Securities and Exchange Commission to allow easier shareholder proxy access as a way to prevent boards and officers from assuming unlimited power.[50] Shareholder participation through Rule 14a-8[51] proposals provides a way for injecting environmental, moral, or political issues into the internal corporate realm.[52] Interestingly, the traditional law and economics academy has fractured over shareholder empowerment, with shareholder advocates such as Lucian Bebchuk and Jesse Fried advocating against inflated CEO compensation,[53] while traditional

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corporation itself—mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together").

48. *See* Smith, *supra* note 1, at 281 n.11 ("In most situations, shareholder and nonshareholder constituency interests coincide . . . despite the shareholder wealth maximization norm. . . . [D]irectors and officers often take nonshareholder constituency interests into account. This is not particularly surprising because no one . . . seriously expects managers to leave their ethical and moral concerns at home.").

49. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) (discussing the internal organization of the corporation in modern society and, specifically, the separation of ownership from control of the modern corporation and its consequences).

50. *See* Grant M. Hayden & Matthew T. Bodie, *The Bizarre Law and Economics of* Business Roundtable v. SEC, 38 J. CORP. L. 101, 103–08 (2012) (discussing the history of SEC proxy-access efforts up through the former Rule 14a-11).

51. Rule 14a-8, General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.14a-18 (2016).

52. *See* H. Rodgin Cohen & Glen T. Schleyer, *Shareholder vs. Director Control over Social Policy Matters: Conflicting Trends in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 82 (2012) (noting the presence of "shareholder proposals on social issues, including environmental, political, non-discrimination, and health-related issues, as well as executive compensation practices").

53. *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE:

law and economics proponents such as Joseph Grundfest and Stephen Bainbridge argue against increased shareholder power, even as they stand by shareholder wealth maximization.[54] In my view, there is a progressive side to these debates, and it is the one that the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has supported.[55] But the progressive corporate law movement has largely avoided these debates, or—worse, in my view—sided with management.[56]

But secondly, and more importantly for our purposes, stakeholder theory does not provide a stable foundation for a theory of corporate governance. As an oppositional theory, stakeholder theory has largely served to act as a rhetorical brake on some of the excesses of shareholder primacy.[57] When confronted

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THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004) (illuminating structural flaws in corporate governance that produce widespread distortions in executive pay).

54. *See* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 603 (2006) ("Such efforts to extend the shareholder franchise are fundamentally misguided."); Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW. 361, 380 (2010) (contending that increased shareholder power can "impair shareholder value").

55. *See* Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345, 1350 (1997) ("Labor-shareholder activism has significant symbolic value because it highlights the fact that working people are the beneficiaries of many institutional shareholders."); Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1019–20 (1998) (finding that "labor activism is a model for any large institutional investor attempting to maximize return on capital"); Damon Silvers, *Commentary on "Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in A More Rational System of Corporate Governance" by Leo E. Strine, Jr.,* 33 J. CORP. L. 85, 87 (2007) ("The AFL-CIO has been engaged in a number of efforts over the last five years to build bridges between long-term investors and the CEO community around the theory that there should be a shared commitment to the long-term health of enterprises.").

56. *See* Christopher Bruner, *Center-Left Politics and Corporate Governance: What Is the 'Progressive' Agenda?* (SSRN Working Paper, February 15, 2017), https://ssrn.com/abstract=2917253 (discussing the seemingly paradoxical approaches taken by different progressive groups as to various corporate governance matters).

57. For a discussion of those excesses, see Bratton, *Enron*, *supra* note 21; Matthew T. Bodie, AOL Time Warner *and the False God of Shareholder Primacy*, 31 J. CORP. L. 975 (2006).

with the task of providing an alternative structure, stakeholder theory has served up relatively weak sauce.[58] Under stakeholder theory, corporate governance structure looks pretty much the same as it does now.[59] If anything, stakeholder theory expands upon the discretion provided to the board—and the management selected by the board—to follow their own judgment in contravention to the will of the shareholders.[60] The most important tangible contribution of stakeholder theory to corporate law is the constituency statute, which is the law in a majority of states (but not Delaware).[61] The constituency statute provides directors with the discretion to take the interests of all stakeholders into account when making certain types of decisions.[62] Directors need not take other interests into account, and there is generally no remedy for other stakeholders.[63] These statutes are just a way of insulating directors from claims that they failed to do enough for shareholders when contemplating a tender offer, merger, or factory shutdown.[64]

The real problem with stakeholder theory is that it is not, at least at present, a real theory of firm governance. As the theory of the firm teaches, governance is necessary when enforceable contract terms are insufficient to protect the interests of the

58. *See* Millon, *Communitarians*, *supra* note 6, at 1387 ("Those who say that [progressive scholars] have not yet articulated a fully developed alternative agenda are correct.").

59. *See* Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2091–92 (2010) [hereinafter Hayden & Bodie, *Shareholder Democracy*] (discussing the Blair and Stout "mediating hierarch" approach).

60. *See id.* (discussing how the "mediating hierarch" board is insulated in order to serve all stakeholders).

61. *See* Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 215 tbl.1 (2006) (finding that thirty-one states have constituency statutes).

62. Some are limited to takeover/mergers, while others apply to all decisions. *See* Millon, *Foundations*, *supra* note 5, at 11–12 ("[Constituency] statutes take varying forms, but they share a common agenda. Each declares that the board of directors, in the course of making corporate decisions, may . . . consider various enumerated nonshareholder interests.").

63. *See id.* at 13 ("To the extent that management must compromise its commitment to shareholder interests for the sake of nonshareholders, shareholders stand to lose.").

64. *See id.* at 13–14 (describing the difficulties faced by corporate management when they are accountable to multiple constituencies despite their potentially "conflicting interest").

parties involved.[65] Firms develop as "islands of conscious power" within the market because they manage issues that could not otherwise be handled by the market.[66] Although the participants are in fact in contractual relationships, these relationships are sufficiently incomplete so as to suffer serious enforcement flaws.[67] As a result, a firm structure is necessary to structure the contracts and provide a mechanism for resolving disputes within the firm.[68]

Even though the nexus of contract theory would seem to be antithetical to the theory of the firm, it does in fact provide a rationale for firms and for shareholder primacy. As developed at length in Easterbrook and Fischel's *The Economic Structure of Corporate Law*, the theory provides: shareholders suffer serious contractual vulnerability at the hands of firm management, who have complete discretion over the returns allocated to shareholders.[69] Shareholders are given voting rights to protect themselves against opportunism by firm management.[70] The other firm participants can more easily protect themselves through contract.[71] But because shareholders hold rights to the residual, they are the best locus of voting power to incentivize the firm to maximize utility for all participants.[72]

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65. *See* Oliver E. Williamson, *Why Law, Economics, and Organization?*, 1 ANN. REV. L. & SOC. SCI. 369, 373 (2005) ("Governance problems are posed when incomplete contracts (to include unforeseen contingencies) are combined with opportunism.").

66. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937) (quoting D.H. ROBERTSON, THE CONTROL OF INDUSTRY 85 (1930)).

67. *See* Rock & Wachter, *supra* note 37, at 1621 (contending that legal governance relations are insufficient to manage the economic firm on their own).

68. *See* Bengt Holmstrom, *The Firm as a Subeconomy*, 15 J.L. ECON. & ORG. 74, 80 (1999) ("When contracts are incomplete in the sense that they cannot incorporate all future contracting opportunities, governance becomes consequential.").

69. *See generally* EASTERBROOK & FISCHEL, *supra* note 36, at 68–69.

70. *See* Rock & Wachter, *supra* note 37, at 1699 (describing one method for "mitigating the potential for opportunism" that can be "accomplished by assigning voting rights to shareholders").

71. *See* Fisch, *supra* note 4, at 659 ("[T]he scope of protection afforded to stakeholder interests depends on the quality of contractual protection.").

72. *See* EASTERBROOK & FISCHEL, *supra* note 36, at 68 ("As the residual claimants, shareholders have the appropriate incentives . . . to make discretionary decisions . . . .").

Stakeholder theory, on the other hand, lacks a model for allocating governance rights and responsibilities among the participants.[73] It could be argued that stakeholder theory is more in tune with the nexus of contracts approach, since it treats all the participants in the firm as deserving of governance consideration.[74] However, it fails to develop a system for managing the different stakeholders within the firm.[75] Stakeholder theory does not, for example, argue that corporations are simply contractual nexuses and, thus, should not exist as legal entities.[76] Nor, more surprisingly, have stakeholder theorists sketched out a system whereby all stakeholders can participate in firm governance. Instead, stakeholder theorists have largely glommed on to the existing structure of corporate law, whereby shareholders elect directors who appoint officers.[77] The only real difference is that

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73. *See* Joseph Heath, *Business Ethics Without Stakeholders*, 16 BUS. ETHICS Q. 533, 543 (2006) (arguing that stakeholder theory creates "extraordinary agency risks" because of the potential for conflicts); Eric W. Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605, 611 (2009) (arguing that stakeholder theory fails to provide a system of mechanisms for governance, other than "balancing" stakeholder concerns).

74. *See* Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Modern Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 666 (2011) ("[S]takeholder theories based on the idea of specific investment of other corporate constituencies . . . [assume] that regular contracts do not provide complete protection for these groups, but are still firmly grounded within the nexus [of contracts] framework.").

75. *See* Orts & Strudler, *supra* note 73, at 609 (claiming that the vagueness of stakeholder theory "is pernicious because it tells us to balance stakeholder interests, but does not say anything about how to determine who (or what) counts as a stakeholder . . . or how to determine when an appropriate balancing has occurred").

76. Instead, many stakeholder theorists also ascribe to the entity view of the corporation, which argues for treating the corporation as a state-created separate entity. *See* Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN. ST. L. REV. 1, 24 (2013)

> CSR scholars and stakeholder theorists have justified consideration of broader stakeholder interests by characterizing the firm as not merely a legal fiction but rather as a moral organism with social and ethical responsibilities, or built upon the view of the corporation as an entity existing in time and as a distinct person.

77. *See* Hayden & Bodie, *Shareholder Democracy*, *supra* note 59, at 2113 (discussing examples).

under stakeholder theory, directors have more discretion to act in the interests of all stakeholders.[78]

It might be possible for stakeholder theory to develop a new system of corporate governance whereby all stakeholders have direct ways to participate in firm governance. But such theorists would have to do the difficult work of assigning rights to all participants in a meaningful way—beyond the contractual protections they already hold. The whole point of firm governance is to move beyond contract.[79] Yet stakeholder theory seems content with the current power structure, as long as directors do not get too beholden to their electorate. This approach is not internally coherent. As Grant Hayden and I have argued in an earlier article, it makes little sense to attack shareholder primacy but then maintain the exclusive shareholder franchise.[80] Stakeholder theory has failed to present a viable alternative to the status quo/shareholder primacy model; at best, it advocates for a watered-down version of shareholder primacy.

Progressive corporate law needs a new model. Instead of treating all stakeholders equally, progressives should focus on two types of stakeholders: shareholders and employees. These are the stakeholders who are invested in the firm in such a way that they need firm governance to protect against opportunism. As contractarians have recognized, shareholders are in fact situated differently from other stakeholders, particularly other capital providers, when it comes to their contractual vulnerability.[81] They have invested their money into the firm with no ability to withdraw

78. *See id.*

79. *See* Coase, *supra* note 66, at 391–93 (discussing why production is organized through firms, rather than markets).

80. *See* Hayden & Bodie, *Shareholder Democracy*, *supra* note 59, at 2113 (discussing the "strange turn" from stakeholder theory to the exclusive shareholder franchise). Stakeholder theorists have acknowledged this difficulty. *See* Blair & Stout, *supra* note 45, at 312 ("Recognizing that shareholder voting rights can act as a safety net to protect against extreme misconduct poses something of a problem for the mediating hierarchy approach, as it suggests that shareholders enjoy more control over how the firm is run than do other members of the coalition.").

81. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 36, at 68–69; Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1197 (2010) (discussing the problem of "shareholder oppression" and vulnerability, and the inability of contracts to unequivocally protect such shareholders).

it and subject to uncertain payoffs, largely at the discretion of management.[82] However, employees are also firm investors. They have invested their labor, reputations, and firm-specific individual capital in the firm and cannot not pull these investments out.[83] By law and by norms, they are compensated on a more regular basis, and with less discretion, than shareholders.[84] However, they are still significantly more attached to the firm, and within the auspices of the firm, than the other stakeholders.[85]

Moreover, the theory of the firm provides support for a governance model that includes employees. Theory of the firm scholars have long appreciated the importance of the employee to our conception of the firm.[86] In fact, Ronald Coase looked to the relationship between employer and employee to demonstrate

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82. *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 392 (2003) (citing the importance of "resource commitment" or capital lock-in as a critical reason for the success of the corporation as a private enterprise).

83. *See* Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 302 (1998) (noting that firm-specific skills "make a worker more valuable to her present employer, but also make her more vulnerable to a firm's opportunistic behavior"); Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 368 (2010) ("For instance, employees may make an investment in corporations by way of undergoing specialised training that might not be able to be used elsewhere in other employment.").

84. As late as the nineteenth century, employees worked for terms as long as a year and were not entitled to any contractual payment if they left before the end. *See, e.g.*, Stark v. Parker, 19 Mass. 267, 292–94 (1824) (denying any contractual recovery for an employee who left after nine months of a twelve-month job); Britton v. Turner, 6 N.H. 481, 491–92 (1834) (denying contractual recovery but allowing for recovery under restitution). Now, however, wage and hour laws require payment for time worked and periodic payments made to the employee. *See generally* The Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2012)).

85. There may be certain exceptions in unusual situations. *See* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 149–223 (1996) (discussing specific instances of customer-owned enterprises); David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253 (2009) [hereinafter Yosifon, *Consumer Interest*] (arguing that consumers are inadequately represented in corporate governance); David G. Yosifon, *Consumer Lock-in and the Theory of the Firm*, 35 SEATTLE U. L. REV. 1429, 1430 (2012) [hereinafter Yosifon, *Lock-in*] (concluding that "a departure from the shareholder wealth maximization norm and an embrace of a multi-stakeholder corporate governance regime may be necessary to overcome agency problems associated with consumer lock-in").

86. *See generally* Coase, *supra* note 66, at 401–05.

empirical support for his theory of the firm.[87] Armen Alchian and Harold Demsetz argued that the importance of the firm (as separate from the market) stems from the need to coordinate production from a variety of inputs.[88] They defined team production as "production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource."[89] Team production is used—and firms replace markets—when the coordinated effort increases productivity, after factoring out the costs associated with monitoring and disciplining the team.[90] Margaret Blair and Lynn Stout relied on this notion of team production in developing their stakeholder-based theory.[91] But the non-separable inputs within team production really belong to employees and shareholders.[92] Shareholders provide capital that is taken within the firm and turned into discretionary funds.[93] Employees work together under the aegis of the firm to produce goods or services in a manner that generally cannot be separated out to assign specific values.[94] All other participants do not really engage in the team production process, and, thus, do not need to work within the firm.[95] Creditors provide money on fixed terms.[96] Suppliers and independent

87. *See id.* at 403 ("We can best approach the question of what constitutes a firm in practice by considering the legal relationship normally called that of 'master and servant' or 'employer and employee.'").

88. *See* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 778 (1972) (describing the firm as a "centralized contractual agent in a team production process").

89. *Id.* at 779.

90. *Id.* at 780.

91. *See* Blair & Stout, *supra* note 45, at 275 (analyzing the "team production problem" arising "when a number of individuals must invest firm-specific resources to produce a nonseparable output").

92. *See id.* at 249 ("If the team members' investments are firm-specific . . . and if output from the enterprise is nonseparable, . . . serious problems can arise in determining how any economic surpluses generated by team production . . . should be divided.").

93. *See id.* at 277 ("Providers of financial capital—shareholders and even, potentially, some creditors—are, by this agreement, just as 'stuck' in the firm as are providers of specialized human capital.").

94. *Id.* at 261.

95. *See id.* at 269 (arguing that "employees, shareholders, and executives" are the main players on the corporate "team").

96. *But cf.* Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1652–55 (2002) (arguing that

contractors provide specific services outside of the firm's scope. Consumers purchase the goods or services after the production process is complete.[97] And the surrounding community regulates the firm as it does all other individuals and organizations within its jurisdiction. Yes, it is fair to say that all of these participants are engaged in the production process. But then all participants in the market are engaged in commerce with one another. It is only when we have a team production process—when the parties cannot effectively use the market—that we need to create a firm and facilitate the process of team production.[98] Employees and shareholders are part of that team production process in a way that stakeholders outside the firm are not.

There has been some recognition within progressive corporate law that employees may be different than other stakeholders. Kent Greenfield has long advocated for a special role for employees in corporate law, including the possibility of board representation.[99] Brett McDonnell has studied and advocated for various forms of worker participation in governance, including employee ownership.[100] Marleen O'Connor's work has largely focused on protecting employees through fiduciary duties and statutory rights.[101] However, most communitarian and/or stakeholder theorists desire to encompass a complete and variegated

"[t]here is no doubt that creditors who loan money to publicly held corporations thereby make a team-specific investment" but that they are "less vulnerable to opportunism when trading with publicly held corporations" when compared to other team members).

97. *See* Yosifon, *Consumer Interest*, *supra* note 85, at 259 (discussing the cabined role of some consumers in the transacting process).

98. *See id.* at 265 ("If the activities and inputs of those participants are adequately coordinated, their collective output can be qualitatively different and vastly larger than the sum of what each individual could produce separately.").

99. *See generally* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 112 (2006).

100. *See* Brett H. McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429, 430–31 (2011) (evaluating "a number of possible strategies for creating a role for employees in corporate governance"); *see also* Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 334 (2008) (promoting employee primacy).

101. *See generally* Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing A Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991); Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB. L. & POL'Y J. 97 (2000).

assemblage of stakeholders.[102] To provide one (topical) example, David Millon has acknowledged that "[t]he most compelling theoretical arguments for nonshareholder protection have focused on employees," and that "the relative inadequacy of bargaining power and other disadvantages may more seriously impede bargained-for protection for employees than for other nonshareholder groups."[103] However, he ultimately has rejected a shareholder-employee model on the grounds that "the idea of the corporation as a community would not justify a model that disregarded the interests of other nonshareholder groups."[104] Other stakeholder theorists have agreed.[105]

Concern for the fates of other stakeholders is understandable and may, in some circumstances, warrant a species of governance protection.[106] Creditors, for example, may receive specific protections when the company is close to bankruptcy as a way of mitigating their particular vulnerabilities in such situations.[107]

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102. *See, e.g.*, Keay, *supra* note 83, at 255–56 ("A stakeholder approach . . . is premised on the notion that an inclusive approach towards all contributors is—from a social, economic and political perspective—valuable.").

103. Millon, *Foundations*, *supra* note 5, at 19.

104. *Id.* at 14.

105. *See, e.g.*, Blair & Stout, *supra* note 45, at 255

> Because this view challenges the shareholder primacy norm that has come to dominate the theoretical literature, our analysis appears to parallel many of the arguments raised in recent years by the "communitarian" or "progressive" school of corporate scholars who believe that corporate law ought to require directors to serve not only the shareholders' interests, but also those of employees, consumers, creditors, and other corporate "stakeholders."

106. *See id.* at 275 ("[T]he public corporation is not so much a 'nexus of contracts' (explicit or implicit) as a 'nexus of firm-specific investments,' in which several different groups contribute unique and essential resources to the corporate enterprise, and who each find it difficult to protect their contribution through explicit contracts.").

107. *See, e.g.*, Robert P. Bartlett, III, *Shareholder Wealth Maximization as Means to an End*, 38 SEATTLE U. L. REV. 255, 296 (2015) ("[C]ourts should revert to their traditional focus on policing against the bargaining failures that can occur when investors use directors to address the incomplete contracting challenges that are replete in corporate finance."); Frederick Tung, *Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance*, 57 UCLA L. REV. 115, 119 (2009) [hereinafter Tung, *Leverage*] (arguing that "bank creditors and other private lenders often enjoy significant oversight and influence over managerial decisions"). For a discussion of the possible expansion of fiduciary duties to creditors, see Frederick Tung, *The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors*, 57 EMORY L.J. 809, 814–15

Certain consumers may have the type of long-term, invested interests, such that some governance and/or ownership rights may make sense.[108] In the main, however, regulation will be the most straightforward way of managing issues that arise and are not amenable to contractual resolution. Creditors have statutory rights within bankruptcy.[109] Consumer protection laws can place mandatory terms or disclosure requirements on firms.[110] Environmental protections address externalities by imposing costs on firms (and individuals) for creating those externalities.[111] But corporate governance, like all firm governance, should be addressed to solving problems that arise within the firm structure—problems related to team production.[112] And employees

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(2008) [hereinafter Tung, *Fiduciary Duties*].

108. *See* HANSMANN, *supra* note 85, at 149–68 (discussing consumer ownership); Yosifon, *Lock-In*, *supra* note 85, at 1449–59 (discussing types of lock-in situations).

109. *See* Tung, *Fiduciary Duties*, *supra* note 107, at 842 ("By the time the firm is in distress, its creditors will enjoy differing rights (including payment and priority rights), differing stakes in the continuation of the borrower firm, and differing contract protections.").

110. *Cf.* Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1169 (2010) ("Despite the many state and federal statutes that have been enacted in the last forty years to regulate consumer transactions, the underlying contract between the company and the consumer remains crucial in determining the rights and liabilities of the parties.").

111. I understand that stakeholder theorists may not want to assign responsibility for the environment purely to environmental regulations, since the fate of our planet is of utmost importance. *See, e.g.*, Matthew T. Bodie, *NASCAR Green: The Problem of Sustainability in Corporations and Corporate Law*, 46 WAKE FOREST L. REV. 491, 491 (2011) ("Slowing down and ultimately reversing global warming is the preeminent global challenge of our time."). But corporate law concerns internal governance, not environmental regulation. For those businesses that want to bake environmental sustainability or other socially beneficial missions into their organizational DNA, most states are now providing the benefit corporation as a legal form for channeling such focus. *See, e.g.*, Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 612 (2017) (defining benefit corporations as "corporations organized for the express purpose of realizing both financial wealth for shareholders and articulated social or environmental benefits"); Matthew J. Dulac, Note, *Sustaining the Sustainable Corporation: Benefit Corporations and the Viability of Going Public*, 104 GEO. L.J. 171, 173–79 (2015) (providing a "primer" on benefit corporations and sustainability).

112. *See* Blair & Stout, *supra* note 45, at 250 ("[P]ublic corporation law can offer a second-best solution to team production problems because it allows rational individuals who hope to profit from team production to overcome shirking

and shareholders are the two primary groups that are engaged in the process of team production within the firm.[113]

And the fate of employees should be of particular concern to progressives' hearts. The late nineteenth century progressive movement sought to empower family farmers and industrial laborers against trusts, robber barons, company towns, corrupt governments, and other forms of entrenched power.[114] We are faced today with a similar sense of alienation and powerlessness in the face of multinational corporations and global governments that seem, to many, radically disconnected from their daily lives.[115] Employees have no official voice in the corporate structure, and they often have little unofficial voice within the workplace.[116] Decisions are made through a hierarchical structure in which the employee plays no part.[117] Labor unions, which had been the primary vehicle for worker engagement with their companies, now represent less than seven percent of the private workforce.[118] Employees have been separated from the corporations for which they work.[119]

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and rent-seeking by opting into an internal governance structure we call the 'mediating hierarchy.'").

113. Note that an employee-equity governance structure for the firm would still align with William Bratton's description of the corporate purpose: "corporate law should facilitate corporate attempts to maximize productive output (and hence wealth) in a competitive economy, encouraging long-term investment at the lowest cost of capital, subject to exterior regulations that control externalities." Bratton, *supra* note 34, at 723–24.

114. *See* Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895, 911 (1996) (discussing "an age of robber barons, monopolies, trusts, and moguls" that led to the progressive movement).

115. *See, e.g.*, Bernie Sanders, *Where the Democrats Go from Here*, N.Y. TIMES, Nov. 11, 2016, at A25 ("Over the last 30 years, too many Americans were sold out by their corporate bosses.").

116. *See* McDonnell, *supra* note 100, at 429 (noting that "corporate law does nothing to encourage any role for employees in corporate governance").

117. *See id.* at 433 ("[I]n large U.S. corporations . . . employees frequently have a suboptimal level of involvement in decision making.").

118. *See Economic News Release: Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 28, 2016, 10:00 AM), http://www.bls.gov/news.release/union2.nr0.htm (last edited Jan. 26, 2017) (last visited Apr. 6, 2017) ("Public-sector workers had a union membership rate (35.2 percent) more than five times higher than that of private-sector workers (6.7 percent).") (on file with the Washington and Lee Law Review).

119. Dalia Tsuk has argued that this process happened as a result of several

But what actual role can employees play in corporate governance? The next Section begins to consider some possible approaches.

IV. The Need for Structural Corporate Law Reform

In the recent case of *eBay Domestic Holdings, Inc. v. Newmark*,[120] former Delaware Chancellor Chandler dismayed many stakeholder theorists by reaffirming corporate law's commitment to shareholder primacy.[121] In discussing an action by the original founders of craigslist to adopt a shareholders' rights plan, Chancellor Chandler stated:

> As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. . . . [The majority shareholders, however,] opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form.

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forces, including academics:

> Focusing on major issues in corporate law—the nature of corporate entities and corporate power—this Article explores how, in the course of the twentieth century, legal scholars and political theorists helped remove the interests of workers (as differentiated from shareholders, officers, and directors) from the core concerns of corporate law and theory. It demonstrates how scholars' conversations about corporate entities and corporate power were influenced by a shared cultural and intellectual objection to Marxist class analysis with its focus on the proletariat. It further explicates how the purging of the working class from scholarly imagination paved a way, first, for the rise of the new classes of managers and owners and the shareholder-centered vision of corporate law and, then, for the emergence of a narrow, shareholder-wealth-maximization norm, which is being questioned today.

Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1864 (2003).

120. 16 A.3d 1 (Del. Ch. Ct. 2010).

121. *See id.* at 34 (refusing to "accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders").

> Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.[122]

The *eBay* decision was disheartening for stakeholder theorists because of its express ratification of shareholder primacy. Up until *eBay*, stakeholder supporters could plausibly argue that Delaware law hovered somewhere between shareholder primacy and stakeholder theory.[123] For every *Revlon*[124] case requiring shareholder wealth maximization, there was a *Time Warner v. Paramount*[125] allowing boards to take actions that would only favor shareholders indirectly, or over the long term.[126]

Despite the result in *eBay*, stakeholder theorists have not given up the hope for doctrinal victories. Indeed, in *Burwell v. Hobby Lobby, Inc.*,[127] the Supreme Court seemed to adopt, to some extent, a stakeholder theory of the corporation for purposes of determining its religious character.[128] The Court's willingness to depart from shareholder primacy arguably made the case a positive development for progressive corporate law.[129] As Lyman

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122. *Id.*

123. For a discussion of the yin and yang of corporate law theory, see Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1386 (2008) ("[C]orporate law is, and will remain, deeply ambivalent—both doctrinally and morally—with respect to each of three fundamental and related issues: the locus of ultimate corporate governance authority, the intended beneficiaries of corporate production, and the relationship between corporate law and the achievement of the social good.").

124. 506 A.2d 173 (Del. 1986).

125. 571 A.2d 1140 (Del. 1990).

126. *Compare Revlon*, 506 A.2d at 182 ("O]btaining the highest price for the benefit of the stockholders should have been the central theme guiding director action."), *with Paramount Commc'ns*, 571 A.2d at 1142 ("We also find that Time's board did not by entering into its initial merger agreement with Warner come under a *Revlon* duty either to auction the company or to maximize short-term shareholder value, notwithstanding the unequal share exchange.").

127. 134 S. Ct. 2751 (2014).

128. *See* Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777, 803 (2015) (finding that when the Court speaks of shareholders, officers, and employees as relevant corporate actors, "[t]his suggests more of a stakeholder conception of the corporation, not a shareholder conception").

129. *See id.* at 822 ("The liberal and progressive agenda within corporate law is to create as much legal, practical, and ideological space as possible for corporations that pursue a variety of social values while still looking to make some money. Justice Alito's opinion fits readily within that agenda."). *But see* Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate*

Johnson and David Millon have claimed, "[t]his judicial endorsement [in *Hobby Lobby*] likely will further legitimate corporate goals other than profit maximization."[130]

Ultimately, however, this is just palace intrigue. The power structures are already in place. As Delaware Supreme Court Chief Justice Leo Strine has put it, in his inimitable way:

> In current corporate law scholarship, there is a tendency among those who believe that corporations should be more socially responsible to avoid the more difficult and important task of advocating for externality regulation of corporations in a globalizing economy and encouraging institutional investors to exercise their power as stockholders responsibly. Instead, these advocates for corporate social responsibility pretend that directors do not have to make stockholder welfare the sole end of corporate governance, within the limits of their legal discretion, under the law of the most important American jurisdiction—Delaware.
>
> According to these commentators, if only corporate directors recognized that the stockholders are just one of many ends they can legally pursue, the world would be a better place. Corporate directors, under this rosy view, may consider any or all of the following to be ends as important, or even more important, than the economic well-being of the corporation's stockholders: the employees, the customers of the corporation, the environment, charitable causes, the communities within which the corporation operates, and society generally.
>
> These well-meaning commentators, of course, ignore certain structural features of corporation law that folks like Madison and Hamilton would have thought important. The contention that [§ 101(b) of the Delaware General Corporation Law ("DGCL")] proves directors are free to promote interests other than those of stockholders ignores the many ways in which the DGCL focuses corporate managers on stockholder welfare by allocating power only to a single constituency, the stockholders.

Paternalism and Its Problematic Implications, 41 J. CORP. L. 71, 110 (2015) ("Put simply, these other constituencies appear to have been useful purely as an instrument to the majority's justification for allowing corporate managers to use the corporate entity as a vehicle for the expression of their own religious beliefs, solely by virtue of having managerial control.").

130. Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 25 (2015); *see also id.* at 31 ("Here the United States Supreme Court speaks clearly to the fundamental issue of corporate purpose and states correctly that corporate law authorizes non-profit-maximizing behavior.").

> Under the DGCL, only stockholders have the right to vote for directors; approve certificate amendments; amend the bylaws; approve certain other transactions, such as mergers, and certain asset sales and leases; and enforce the DGCL's terms and hold directors accountable for honoring their fiduciary duties. In the corporate republic, no constituency other than stockholders is given any power.[131]

I understand the desire of progressives to influence the Delaware chancellors and justices and to ameliorate some of the harsh effects that a focus on short-term share price can bring. (Indeed, the Chief Justice understands this desire as well.[132]) And I do not mean to diminish the impact of either Delaware corporate law doctrine or its hortatory rhetoric in shaping behavior in boardrooms across America.[133] However, fighting over the extent to which courts embrace the ideology of shareholder primacy should not be the only, or even the primary, grounds upon which the academic battles rage. Changes in the power structure are necessary to effectuate much of what a progressive corporate law would seek to accomplish.[134] But there is no meaningful alternative.

Thus, progressive corporate law must turn its attention to the kind of reforms that would bring about meaningful change. The progressive corporate law agenda must include changes to the

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131. Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 763–66 (2015); *see also* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That for-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 135–36 (2012) ("[T]he continued failure of our societies to be clear-eyed about the role of the for-profit corporation endangers the public interest.").

132. Strine, *Toward a True Corporate Republic*, *supra* note 21, at 1769–70 (arguing against a shareholder-primacy approach that in his view "put[s] too much power in the hands of institutional investors with short-term interests").

133. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1015 (1997) ("Delaware courts fill out the concept of 'good faith' through fact-intensive, normatively saturated descriptions of manager, director, and lawyer conduct, and of process—descriptions that are not reducible to rules . . . .").

134. Providing for employee participation in corporate governance would require changing state corporate law or superseding provisions of federal law. For an example of providing for such participation through a nonbinding employee vote on transformative transactions, see Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871 (2007).

statutory structure that would better accomplish the distribution of power within the firm.[135] Such a task may not only seem impossible—it may seem outside the institutional competence of law professors, and it may seem extremely unlikely to occur. But otherwise, we are stuck arguing about the dicta used in the *eBay* and *Hobby Lobby* opinions.[136] We should aim higher.

At the same time, we should look to shape corporate behavior in ways beyond those traditional pillars of corporate law—voting rights and fiduciary duties. Corporations are already beginning to experiment in greater numbers with different forms of employee participation in internal firm governance.[137] It may be that the real action is within the corporation's internal governance structure, operating within the loose legal constraints that corporate law imposes.[138] But corporate law may nevertheless still have a role to play in managing the boundaries of these internal structures and providing incentives to the firm to adopt employee-friendly policies. Federal employee benefits law has very successfully provided carrots and sticks to encourage companies to create and maintain appropriate employee pension and welfare benefits.[139] A similar scheme could encourage companies to provide greater employee participation within the governance of a firm.

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135. For purposes of this essay, I leave aside the question of whether the most efficient result is by definition the most just result.

136. As Johnson and Millon recognize, the Supreme Court's *Hobby Lobby* opinion has no direct effect on state corporate law doctrine and has at most "persuasive force." Johnson & Millon, *supra* note 130, at 24 ("[T]he Court's views on corporate purpose would not be binding in the context of a state law dispute on the issue of permitted (or mandated) corporate purpose, if the state's highest court had decided otherwise or the state legislature had amended the corporate statute.").

137. For a description of one such system known as "holacracy," see BRIAN J. ROBERTSON, HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD (2015); Ethan Bernstein et al., *Beyond the Holacracy Hype*, HARV. BUS. REV. 38 (July–Aug. 2016).

138. *See* Anthony J. Casey & M. Todd Henderson, *The Boundaries of "Team" Production of Corporate Governance*, 38 SEATTLE U. L. REV. 365, 367 (2015) ("Real governance power lies elsewhere, and largely outside of the gaze of modern corporate law scholarship.").

139. *See* Peter J. Wiedenbeck, *"Ninety-Five Percent of [Them] Will Not Be Missed": Recovering the Tax Shelter Limitation Aspect of ERISA*, 6 DREXEL L. REV. 515, 517 (2014) (discussing ERISA's "preferential tax treatment on plans providing retirement savings to a broad cross-section of the workforce").

The siren call of a citation from the Chancery Court is strong. But progressive corporate law scholars have for too long focused on copacetic judicial opinions as the highest metric of success. Instead, we must look to facilitate different governance structures and encourage those models that best provide more meaningful participation.[140] We should look to the theory of the firm for our methodological foundation, but we should also look to real world companies to provide concrete examples of the kinds of organization we want to champion.

V. Conclusion

My thanks to Lyman Johnson and David Millon for their foundational opposition to mainstream corporate law and economics. The lessons of their research are manifold and long-lasting, and I look forward to engaging with their work for years to come. But the progressive corporate law movement has hit something of a dead end. We must move our methodological attention to the theory of the firm, focus on the role of employees within the corporation, and reimagine the basic power structures that frame corporate law. If we do these things, we will have a true alternative to shareholder primacy, along with a bedrock of interdisciplinary research to back it up.

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140. *See* Justin Blount, *Creating A Stakeholder Democracy Under Existing Corporate Law*, 18 U. PA. J. BUS. L. 365, 370 (2016) (setting forth "different methods for how a stakeholder governed corporate structure could be created under this extant legal structure").